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HOWBERT AND OTHERS V. CAUTHORN.*

Supreme Court of Appeals: At Richmond.

November 20, 1902.

1. **REMAINDERS**—*Vested or contingent—Construction.* The law prefers vested to contingent remainders, and this preference may properly influence the mind in cases of doubtful construction, as in fixing the period to which words of survivorship relate where this is left in doubt, but it can never justify the courts in straining the language used in order to make the estate created a vested rather than a contingent remainder.
2. **REMAINDERS**—*Case in judgment—Contingent remainder—Judgment against remainderman.* In the case in judgment the grant was to a trustee in trust for the benefit of Lucy Ann Thomas for life, with remainder in fee-simple to the children of the said Lucy Ann living at her death, and the decendants of such as may be dead, in equal shares by stocks, and if there be no such child or children, nor descendants of such, living at the death of the said Lucy Ann, then over. Lucy Ann and two children were living at the time of the grant, and are still living.
Held: 1. The children take contingent remainders.
2. The interest of each child, while the other is living, is too unsubstantial and shadowy to be subjected to the payment of judgments recovered against him.
3. **REMAINDERS**—*Vested remainder defined.* A remainder is vested when it is subject to no condition precedent, and is always ready, during its continuance, to come into the possession of a certain person, already existing and ascertained, on the determination of the particular estate, now or hereafter, in any manner whatsoever.

Appeal from decrees of the Circuit Court of Bedford county, pronounced October 24, 1900, and June 11, 1901, in a suit in chancery where the appellee was the complainant, and the appellants and others were the defendants. *Reversed.*

The opinion states the case.

William Eubank and Beasley & Moon, for the appellants.

Graham Claytor, for the appellee.

HARRISON, J., delivered the opinion of the court.

This attachment proceeding in equity was instituted by the appellee against the appellant, Mary E. Howbert, formerly Mary E. Thomas, a non-resident, alleging that appellant was entitled to

* Reported by M. P. Burks, State Reporter.

an estate in remainder in certain real estate, and asking that the same might be subjected to the payment of a debt evidenced by bond executed by appellant to G. T. Cauthorn, and by him assigned to the appellee.

It appears that by deed of July 9, 1862, John F. Sale and wife conveyed to John Frederick Thomas, the father of appellant, certain real estate, in Bedford City, upon trust, for the use of his wife, Lucy Ann Thomas, for life, with remainder, "*in fee simple to the children of the said John Frederick Thomas and the said Lucy Ann Thomas living at the death of the said Lucy Ann Thomas, and the descendants of such as may be dead, in equal shares by stocks, and if there be no such child or children, nor descendants of any such living at the death of the said Lucy Ann, then the said John Frederick Thomas, if living, shall stand seized of said lot or parcel of land. . . . in fee simple to his own use; and if dead, the same shall vest in fee simple to the heirs at law of the said John Frederick Thomas.*"

John Frederick Thomas died, leaving surviving him his wife Lucy Ann Thomas, the life tenant, and two children, who were born to John Frederick Thomas and Lucy Ann, prior to the execution of the deed of July 9, 1862; namely, Mary E. Howbert, the appellant, and her brother, J. Walker Thomas, all three of whom are still living.

A demurrer was filed to the bill by the appellant which raises the sole question presented for decision by this appeal; whether or not Mary E. Howbert owns an interest, under the deed, that can be subjected to the payment of her debts. The Circuit Court overruled the demurrer, holding that appellant was entitled to a vested remainder in one moiety of the real estate mentioned, and decreed a sale of the interest thus established to satisfy the debts that had been reported. This action of the lower court is assigned as error; it being contended on behalf of appellant that her interest in the land is not a vested remainder, but a contingent remainder that cannot be subjected to sale.

It is true that the law prefers vested to contingent remainders, and this preference may lawfully and properly influence the mind in cases of doubtful construction; but it can never justify the courts in making a deed or will, or in straining the language used in order to make the estate created a vested rather than a contingent remainder. *Olney v. Hull*, 21 Pick. (Mass.) 311; *Vashon*

v. *Vashon*, 98 Va. 170. In obedience to this disposition in favor of vested remainders this court has held, where the question involved was the period to which words of survivorship related, that, in the absence of the expression of a particular intent, the survivorship has relation to the death of the testator. *Martin v. Kirby*, 11 Gratt. 67. And in *Hansford v. Elliott*, 9 Leigh 79, Judge Parker, in determining whether the words surviving children should be taken to refer to the period of the testator's death, or to the death of his widow, the tenant for life, says: "If to the former, the interest vested in all of the testator's children living at his death, and passed to their representatives; the time of distribution being alone postponed; if to the latter, then Elizabeth and Peter Manson, who alone survived the life tenant, were entitled to the whole property."

In the case at bar the language of the grantor is perfectly clear, leaving no room for question or doubt as to its meaning and purpose. After carving out the life estate in favor of Lucy Ann Thomas, the remainder is given to the children "*living at the death of the said Lucy Ann Thomas*," and if there be no such child or children, nor the descendants of any such "*living at the death of the said Lucy Ann*," then over. This language is too plain for construction. In express terms the period of survivorship is fixed at the death of Lucy Ann Thomas, the life tenant. It is manifest that the remaindermen, who are to take after the termination of the life estate, cannot be known or ascertained until the life tenant is dead, for it is not given to man to know who will survive a future event, itself, in point of time, the most uncertain of all events. It is therefore clear that appellant has no interest under the deed in question during the lifetime of her mother, Lucy Ann, but a contingent remainder. Her interest is dependent upon the condition precedent that she survive the life tenant. She may, therefore, never have an interest in the subject, for if the life tenant should survive her, the estate would pass to others whose identity cannot be now known or determined.

The only way in which the remainder in favor of appellant could be considered vested would be by construing the words of survivorship ("living at the death, etc.") as creating a condition subsequent, instead of precedent, this latter being plainly the nature of the condition in the case at bar, both on principle and authority. Very often a remainder will be construed to be a vested estate upon

a condition subsequent liable to be divested by the happening of the contingency, rather than declare it to be a contingent remainder, as it would be if the condition were precedent. Graves on Real Property, p. 194, note.

Prof. Graves, in his work on real property, after pointing out that, in considering a remainder, we must assume that it still exists as a remainder, and judge of its character as vested or contingent under the facts as they are at the moment the question arises, gives the following very clear and satisfactory definition of a vested remainder: "A remainder is vested when it is subject to no condition precedent, and is always ready, during its continuance, to come into the possession of a certain person, already existing and ascertained, on the determination of the particular estate, now or hereafter, in any manner whatsoever." And adds that "any remainder not so ready is contingent." In a note to this definition, the learned author says: "It will be observed that the definition requires that the remainderman, at the time the question arises, should already be in existence and ascertained; and it is not enough, in order to consider the remainder now vested, that he will become ascertained at the moment the particular estate ends and the possession becomes vacant. Thus there are cases where the same event that ends the particular estate ascertains the remainderman; and whenever the possession becomes vacant there will then be a certain person ready to take possession; as in the limitation, to A for the life of B, remainder to the heirs of B, or to A and B for life, remainder to the survivor and his heirs. Here the remainder will vest and come into possession *eo instanti* on the death of B in the one case, or the survivorship of A or B in the other, but meanwhile it remains contingent, because, as yet, there is no "determinate person" in whom "the estate is invariably fixed," *nemo est haeres viventis*, and who can tell whether A or B will be the survivor? A test suggested by Prof. J. Randolph Tucker will clearly show that these remainders are contingent, viz: Is the remainderman a person to whom you could give livery of seisin now, if his estate were present and not future? How could livery be made to the heirs of B while B is living, or to the survivor of A and B while both are alive? . . . For the reasons above stated, Fearnes' Test of a vested remainder, viz: "The present capacity of taking effect in possession, if the possession were to become vacant," is open to exception in omitting to add, after "taking effect in possession,"

the words "*of an already existing and ascertained person;*" but the whole tenor of his discussion of remainders shows that this was intended." Graves on Real Property, pp. 190-4.

In 20 Am. and Eng. Ency. of Law (1st Ed.), p. 841, we find the following very clear statement of the law bearing upon this question: "The fact that the remainder from the very instant of its creation is capable of taking effect in possession or enjoyment at any moment the possession or enjoyment may become vacant by the determination of the particular estate does not, as is frequently asserted, necessarily show that it is vested; nor yet is it quite accurate to say that 'When it is certain the remainder may take effect in possession, on the determination of the preceding estates means, these estates may determine,' the remainder must be considered as vested. Thus if an estate be limited to two for life, remainder to the survivor of them in fee, the remainder is contingent, for until one of them die, it is uncertain which will be the survivor; or if the land be limited to A for life, remainder to 'such of his children as shall be living at his decease,' each child has but a contingent remainder during A's life, since until his death it is impossible to tell which of the children will answer the description, and yet inasmuch as under both these limitations the person or persons who are to take are ascertained immediately on the determination of the particular estate, the remainders may well be said to be capable of taking effect in possession or enjoyment at any moment the possession or enjoyment may become vacant by the death of the life tenant, and may even be said to be certain to take effect on that event unless the remaindermen predecease the life tenant. A moment's consideration shows that the apparent anomaly arises from the fact that whether the remainders will ever take effect in possession really depends upon two contingencies, (1) Whether the remaindermen answer the description; (2) Whether they survive the life tenant, and that the first depends upon the second and seems to be merged in it, whereas in reality, until the life tenant dies, it always exists and affects the remainders with a contingency irrespective of their own duration. It is therefore submitted that, in order that a remainder may vest in interest, not only must it be capable of taking effect in possession at any moment the possession may become vacant, but there must also be some certain and determinate person *in esse* and ascertained who answers the description of the remainderman at some time during the con-

tinuance of the particular estate, and not merely at its determination."

The law touching the nature of vested and contingent remainders is stated in Washburn on Real Property as follows: "'The present capacity of taking effect in possession, if the possession were now to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines, universally distinguishes a vested remainder from one that is contingent.' By *capacity*, as thus applied, is not meant simply that there is a person *in esse* interested in the estate, who has a natural capacity to take and hold the estate, but that there is further no intervening circumstance, in the nature of a precedent condition, which is to happen before such person can take. As, for instance, if the limitation be to A for life, remainder to B, B has a capacity to take this at any moment when A may die. But if it had been to A for life, remainder to B, after the death of J. S., and J. S. is still alive, B can have no capacity to take till J. S. dies. When J. S. dies, if A is still living, the remainder becomes vested, but not before."

The author, in further considering the fact that a remainder is contingent by reason of the person who is to take it not being ascertained, says: "Thus upon a devise to A for life, remainder to the surviving children of J. S., it is obvious that, in terms, it is equivocal whether the surviving relates to the death of the testator, or to A. If to the latter, the remainder must be contingent, since no one can tell who will be such survivors until the death of A. Whereas, if the term relates to the testator's death, and J. S. then have children, the remainder is a vested one, since there is then an ascertained person, *in esse*, capable of taking the estate *in praesenti* at any moment." 2 Washburn on Real Prop. (3d Ed.), sec. 1, paragraphs 17-18, top pp. 507-510.

It will be observed that the learned author treats the remainder as contingent, without question, when the period of survivorship relates to the death of the life tenant. In such case he says: "*The remainder must be contingent, since no one can tell who will be such survivors, until the death of A,*" the life tenant.

In *Olney v. Hull*, 21 Pick. *supra*, a testator, after devising to his wife the use of his real estate, while she remained his widow, proceeded as follows: "Should my wife marry or die, the land then shall be equally divided among my surviving sons, with each son

paying sixty dollars to my daughters, to be equally divided among them, as soon as each son may come into possession of said land." It was held that the remainder given to the sons was contingent until the marriage or death of the widow of the testator; and that upon her death, the estate vested in a son who was then living, to the exclusion of the heirs of another son who died before the widow, but after the death of the testator. See also *Blanchard v. Blanchard*, 1 Allen 223; *Ducker v. Burnham*, 146 Ill. 9; *In Re Rider*, 11 Paige 185; *Stump v. Finley*, 2 Rawle 168; *Watson v. Smith*; 110 N. C. 6 (14 S. E. 640); *Nicholson v. Cousar*, 50 S. C. 206, 27 S. E. 628; *Henderson v. Peachy*, 3 Leigh 68; *Baylor v. Dejarnette*, 13 Gratt. 152; *Wallace v. Minor*, 86 Va. 550; *Robinson v. Robinson*, 89 Va. 916; *McComb v. McComb*, 96 Va. 779.

The very earnest contention that the estate in question is a vested, and not a contingent remainder, has induced a more extended citation of authority than would have otherwise been considered necessary. The conclusion reached might have been rested alone upon the recent decision of this court in *Vashon v. Vashon*, 98 Va. 170, which clearly rules the case at bar. In that case, the deed, after creating a life estate in favor of George S. and Martha V. Vashon, disposes of the remainder in the following words: "But if upon the death of the said Martha V. Vashon the said George S. Vashon shall not be living, or if upon the death of the said George S. Vashon the said Martha V. Vashon shall not be living, then upon the further trust to sell the said property in such manner as may seem best to the said party of the second part, his heirs, assigns, or successors in the office of trustee, and to divide the proceeds of such sale among the issue of the body of the said George S. Vashon, the same taking *per stirpes* and not *per capita*, if such issue of his body there should be, and if there should be no such issue then living, to pay over the same to the heirs at law of the said George S. Vashon."

George S. Vashon had a numerous family of children, some of whom died during his lifetime unmarried and without issue. The contention was that the children of George S. Vashon, living at the date of the deed, took a vested remainder, but this court denied that claim, and held that said children took contingent remainders which were defeated upon their death without issue during the life of George S. Vashon; that the interest of the children, under the deed, was dependent upon their being alive at the death of their

father, who survived Martha V. Vashon, a contingency which never happened, and that therefore they had no estate which their father could inherit. *Graves on Real Prop., supra; Price v. Hall*, L. R., 5 Eq. 399; *Augustus v. Seabolt*, 3 Metc. (Ken.) 155; *McCraw v. Davenport*, 6 Port. (Ala.), 319; *Nash v. Nash*, 12 Allen 345.

Inasmuch as Lucy Ann Thomas, the life tenant in the case at bar, is still living; and J. Walker Thomas, the brother of the appellant, is still living; it follows, in the light of the foregoing authorities, that the appellant has a contingent remainder in one moiety of the land mentioned, subject to be defeated by her death in the lifetime of Lucy Ann Thomas, when the interest would pass under the deed to others.

The second branch of the case involves the question whether or not such an unsubstantial and shadowy right as that held by the appellant can be subjected to sale for the benefit of her creditors. Such an interest is a pure contingency—a bare possibility whether it will ever exist or not. During the life of Lucy Ann Thomas such an interest hardly arises to the dignity of an estate. On the part of a purchaser, at a judicial sale, it would be a perfect hazard, for it could not be known to any one whether the supposed interest, being sold, would ever be of any value. It would be a mere speculative transaction and ruinous in its consequences, not only to the creditors, but to all parties interested. It has not been, that we are aware of, the practice to offer at public auction such an interest for the satisfaction of debts, nor do we think that such a practice should be established. See *Watson v. Dodd*, 68 N. C. 528; *Watson v. Watson*, 3 Jones Eq. 400; *Jackson v. Waldron*, 12 N. Y. Com. Law 176; *Breeding v. Davis*, 77 Va. 639; *Young v. Young*, 89 Va. 675. In *Watson v. Dodd, supra*, it was held that the contingent interest of one of the devisees, expectant upon the death of the life tenant without issue, could not be subjected to the payment of his debts. In *Watson v. Watson, supra*, the court declared that, the land being limited by way of contingent remainder to persons not *in esse*, it had no power to order a sale for the purpose of converting it into more beneficial property. The principle involved is analogous to that decided in the recent case (not yet reported) of *Boisseau v. Bass*, where it was held that the interest of an assured in a policy on his life which has no present market value, but is dependent for its continued existence on voluntary payments to be

made in the future by the assured, is not such an interest or estate as can be reached by the *fiery facias*. 7 Va. Law Register, 859.

For these reasons we are of opinion that the decree appealed from should be reversed, and a decree entered here sustaining the demurrer, and dismissing the bill filed by the appellee with costs.

Reversed.

NOTE.—We commend the very excellent opinion in this case to the careful study of the Virginia bar. Neither of the two main questions decided was novel, but the question, now finally settled, as to the character of the remainders, whether vested or contingent, in cases of this character, is constantly making difficulty for the lawyers in this State—due, in large part, it is believed, to the inaccurate, or misunderstood, test of a vested remainder laid down in 2 Minor's Inst. (4th ed.), 396, following Fearne, namely, 'present capacity to take effect in possession should possession become vacant.'

But, howsoever the trouble arose, there has undoubtedly been much confusion of thought on the subject among the Virginia lawyers. For example, in the principal case the limitation was to 'A for life, remainder to the children of A and her husband B, living at the death of A and the descendants of such as may be dead.' Applying the test of Prof. Minor and Mr. Fearne, the moment A dies, the remainder takes effect in possession, and hence, by this test, the remainder is vested. Yet no one who reads the foregoing very excellent opinion of Judge Harrison, can doubt but that it is contingent. We rejoice that the question is now set at rest, and that we have an accurate definition of vested and contingent remainders, adopted by a unanimous court, after full argument, and fortified by an opinion which will withstand all assault.

Referring again to the Fearne and Minor test of a vested remainder, it is believed that, correctly understood, it may be justified as formulated by them. The test is inaccurate only on the assumption that the possession cannot become vacant otherwise than by the death of the particular tenant. If this assumption were true then, in a limitation such as that in the principal case, the moment the possession becomes vacant by the death of the life tenant, the remainder vests in the surviving children, and hence there is present capacity to take effect *eo instanti* the vacancy occurs, and hence the remainder would (by this test) be vested. But the estate of the life tenant may end (that is the 'possession may become vacant') by other means than the death of the life tenant, for example, by a surrender [2 Minor Inst. (4th ed.), 789] or by forfeiture (Ib. 111-112, 598-600). Hence the limitation in the principal case—to A for life, remainder to her children living at her death—may be shown to be a contingent remainder even by the Fearne test, since the remainder has not the present capacity, under all circumstances, to take effect in possession should possession become vacant. For if the possession should become vacant in any other manner than by the death of the life tenant, the remainder would not be ready to vest in possession, but would still have to await the death of the life tenant.

This view is admirably presented in a learned opinion by Shepherd, C. J., in *Starnes v. Hill*, 112 N. C. 1, 16 S. E. 1011. In reply to the argument that no merger or surrender can have the effect of destroying the particular estate under

the modern system of tenures in America, and that feudal doctrine of forfeiture no longer prevails, the learned Chief Justice said: "The answer is, that the rule which distinguishes a vested from a contingent remainder has for centuries been a rule of property of the common law, and 'to disregard rules of interpretation sanctioned by a succession of ages, and by the decisions of the most enlightened judges, under the pretense that the reason of the rule no longer exists, or that the rule itself is unreasonable, would not only prostrate the great landmarks of property, but would introduce a latitude of construction, boundless in its range and pernicious in its consequences.' 4 Kent's Com. 231. 'We have many laws,' says Mr. Fearn, 'the origin of which cannot at this distant period be traced at all, yet justly should we laugh at the man urging that as an argument against the present validity of such laws; and surely a law for which no reason now appears, has no more original ground, in the present state of things, than a law whose origin may be traced up to a circumstance which does not now exist.' Fearn on Rem., p. 87."

Prof. Graves' definition of a vested remainder, adopted by the court in the principal case, seems to remove all difficulty, to be beyond criticism.

The other main point in the principal case, namely, that a contingent remainder is too uncertain an interest to be subjected at the suit of the remainderman's creditors is worthy of notice. This was practically decided in *Young v. Young*, 89 Va. 679, where it was held that such an interest was not liable to attachment. The court was not called upon to decide, and did not decide, whether a judgment would be a lien on such an interest—the decision being merely that the interest, so long as contingent, was too uncertain to be sold at the suit of the judgment creditor. Such an interest may be conveyed, as held in *Young v. Young*. *Quere*: Is a judgment a lien on a contingent remainder, enforceable if, and when, it vests? Under the ruling in *Boisseau v. Bass*, 7 Va. Law Reg. 859, cited in the foregoing opinion, namely, that a *fiery facias* is not a lien on a contingent interest in personalty, a judgment will probably be held not to be a lien on contingent interests in realty.

H. M. BROWN V. NORFOLK & WESTERN RAILWAY CO.*

Supreme Court of Appeals: At Richmond.

November 20, 1902.

1. LIBEL—*Privileged communications—Bona fides of publication—Case at bar.*

Whether the occasion for the publication of defamatory matter is privileged is a question of law for the court, but whether it has been used *bona fide* is a question of fact for the jury. In the case at bar, an officer of the defendant company, after full investigation and inquiry as to alleged misconduct of the plaintiff, an employee of the company, and fully satisfying himself of the truth of the allegations, dismissed him from the service of the company, and published the following order: "A fireman has been dismissed from the service for intimating that an officer of the company had cast reflections

* Reported by M. P. Burks, State Reporter.